

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**SAFECO INSURANCE COMPANY OF AMERICA,
RESPONDENT**

vs.

**SHERRI LEE SMITH, et al.,
APPELLANT**

DOCKET NUMBER WD71356

DATE: JUNE 1, 2010

Appeal from:

Buchanan County Circuit Court
The Honorable Patrick K. Robb, Judge

Appellate Judges:

Division Two: Joseph M. Ellis, P.J., Victor C. Howard and Zel M. Fischer, JJ.

Attorneys:

Timothy J. Wolf, for Respondent

Phillip A. Burdick, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

SAFECO INSURANCE COMPANY OF AMERICA, RESPONDENT

v.

SHERRI LEE SMITH, et al., APPELLANT

WD71356

Buchanan County

Before Division Two Judges: Joseph M. Ellis, P.J., Victor C. Howard and Zel M. Fischer, JJ.

Thomas Allen Smith and Sherri Lee Smith (“the Smiths”) appeal from a summary judgment entered by the Circuit Court of Buchanan County in favor of Safeco Insurance Company in a declaratory judgment action filed by Safeco seeking a declaration that an insurance policy it issued does not provide coverage for Clint Smith with respect to a fatal accident that killed the Smith’s son, A.J. Smith. In that motion, Safeco claimed that testimony by Clint and the truck’s owner, Eric Cox, conclusively established that Clint did not have permission to use the truck and was, therefore, not covered under the policy. The insurance policy at issue excluded coverage for any insured “[u]sing a vehicle without a reasonable belief that [he or she] has permission to do so.”

REVERSED AND REMANDED.

Division Two holds:

- (1) While the Smiths do not, and cannot, offer direct evidence contradicting Clint’s and Eric’s testimony, contrary to Safeco’s assertions, the credibility of this deposition testimony may be challenged through indirect evidence and reasonable inferences drawn therefrom.
- (2) Implied permission may result from a common practice or course of conduct whereby the owner acquiesces in the practice of another operating his automobile. Evidence in the record reflects that Eric had allowed Clint to use his truck on multiple occasions with and without him present. Furthermore, earlier in the evening, Eric had asked Clint to drive the truck and, after they returned to the house, Eric left the keys where Clint had easy access to them. Moreover, the deposition testimony reflects that Eric had never told Clint he could not drive the truck. From the record, it is clear that neither boy considered Clint’s lack of a driver’s license to be an impediment to his driving the truck. Viewing the evidence in accordance with our standard of review it cannot be said that Safeco is entitled to judgment as a matter of law.

Opinion by: Joseph M. Ellis, Judge

Date: June 1, 2010

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